EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

90-621

Supreme Court, U.S.
FILED
OCT 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1990

RONALD D. CASTILLE, District Attorney
of Philadelphia County;
JOSEPH M. RYAN, Superintendent,
State Correctional Institute at Dallas;
and ERNEST D. PREATE, Jr.,
Attorney General of Pennsylvania,
Petitioners

V.

WILLIAM HOWARD HARRISON,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
(Counsel of Record)
ELIZABETH J. CHAMBERS
Chief, Federal Litigation
KATHY L. ECHTERNACH
Assistant District Attorney
WILLIAM G. CHADWICK, Jr.
First Assistant District Attorney
RONALD D. CASTILLE
District Attorney
Philadelphia County

1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700

QUESTION PRESENTED

Where credited, uncontradicted, circumstantial evidence supports a habeas court's factual finding that racial bias was not the motive for a prosecutor's use of a peremptory challenge in a case tried years before Batson v. Kentucky was decided, does Batson nonetheless require relief solely because the passage of time has made the prosecutor unable to recall his precise race-neutral reason for the strike?

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Authorities	iv-v
Opinions Below	2
Statement of Jurisdiction	2
Constitutional Provision Involved	3
Statement of the Case	3-14
Reasons for Granting the Writ	
This Court Should Grant Review To Resolve A Decisional Conflict Among The Circuits And Make Clear That Batson v. Kentucky Does Not Require Relief In A Case Tried Years Before Batson Was Decided Where Credited, Uncontradicted, Circumstantial Evidence Supports A Habeas Court's Factual Finding That Racial Bias Was Not The Motive For a Prosecutor's Use Of A Peremptory Challenge And The Prosecutor Is Unable To Recall The Precise Race-Neutral Reason For The Strike Solely Because Of The Passage Of Time.	15-28
Conclusion	29

PAGE

Appendix A:

Order and Opinion of the United States Court of Appeals for the Third Circuit A-1 - A-18

Appendix B:

Memorandum Order of the United States District Court for the Eastern District of Pennsylvania B-1 - B-5

Appendix C:

Report and Recommendation of the Chief United States Magistrate for the Eastern District of Pennsylvania C-1 - C-69

TABLE OF AUTHORITIES

	PAGE
Federal Cases	
Allen v. Hardy, 478 U.S. 255, 106 S.Ct. 2878 (1986)	17,20,27
Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986)	passim
Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987)	5,28
Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824 (1965)	4
United States v. Allen, a/k/a Harrell, 666 F. Supp. 847 (E.D. Va. 1987), aff'd, 847 F.2d 138 (4th Cir.), cert. denied, 488 U.S. 944, 109 S.Ct. 371 (1988)	26
United States v. David, 803 F.2d 1567 (11th Cir. 1986)	25
United States v. Forbes, 816 F.2d 1006 (5th Cir. 1987)	25
United States v. Harrell, a/k/a Allen, 847 F.2d 138 (4th Cir.), cert. denied, 488 U.S. 944, 109 S.Ct. 371 (1988)	26

TABLE OF AUTHORITIES (cont'd)

	PAGE
United States v. Nicholson, 885 F.2d 481 (8th Cir. 1989)	25
United States v. Wilson, 867 F.2d 486 (8th Cir.), cert. denied, 110 S.Ct. 92 (1989)	24

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1990

RONALD D. CASTILLE, District Attorney
of Philadelphia, et al.,
Petitioners

V.

WILLIAM HOWARD HARRISON,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioners, Ronald D. Castille, District Attorney of Philadelphia County, Joseph M. Ryan, Superintendent, State Correctional Institute at Dallas, and Ernest D. Preate, Jr., Attorney General of the Commonwealth of Pennsylvania, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for

the Third Circuit, entered in this proceeding on July 25, 1990.

OPINIONS BELOW

The published panel opinion of the United States Court of Appeals for the Third Circuit, affirming the District Court order granting the petition for habeas corpus, is reprinted in Appendix A at A-1 - A-18. The memorandum order of the United States District Court for the Eastern District of Pennsylvania is reprinted in Appendix B at B-1 - B-5. The report and recommendation of the Chief United States Magistrate for the Eastern District of Pennsylvania, which was adopted by the District Court, is reprinted in Appendix C at C-1 - C-69.

STATEMENT OF JURISDICTION

Respondent William Howard Harrison brought this habeas corpus action pursuant to 28 U.S.C. Section 2254. The judgment of the United States Court of

Appeals for the Third Circuit, affirming the District Court's grant of habeas corpus relief, was entered on July 25, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Section 1:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In September of 1982, more than three years before this Court decided Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), respondent, who is black, was convicted by a jury of robbery and conspiracy. Respondent's trial for the gunpoint robbery of a Philadelphia bank did not involve any racially sensitive issues. Nevertheless, during voir dire,

defense counsel objected to the prosecutor's use of peremptory strikes to remove black venirepersons. The trial court overruled counsel's objection because the law, as it then existed under Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824 (1965), did not require the prosecutor to explain his strikes. Respondent's petit jury ultimately consisted of eleven white jurors and one dark-skinned person from India; the prosecutor used six of his eight peremptory challenges to remove black venirepersons.

The Pennsylvania Superior Court affirmed the conviction on May 16, 1986, just two weeks after Batson was decided, holding that respondent had failed to make a prima facie showing of intentional racial discrimination under Batson. Respondent's petition for allowance of appeal to the Pennsylvania Supreme Court,

which reiterated his Batson claim, was denied on December 29, 1986.

Respondent filed the instant habeas corpus action in November of 1987. Subsequently, the District Court for the Eastern District of Pennsylvania ordered an evidentiary hearing on the claim that the prosecutor had improperly exercised his peremptory strikes more than three years before Batson was decided.[1]

At the District Court hearing, held six years after trial, the Commonwealth called the prosecutor. He testified as to his general jury selection strategy while employed in the Philadelphia District Attorney's Office and explained his peremptory challenges in

---

[1]Since respondent's case was still pending on direct appeal when Batson was decided, his claim was cognizable. Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987).

respondent's case. Additionally, the Commonwealth introduced the prosecutor's hand-written notes, made at the time of voir dire; these notes evidenced his deliberative process during jury selection in respondent's trial six years earlier.

The prosecutor, who was in private practice at the time of the Batson hearing, had no independent recollection of the race, physical appearance, demeanor or responses of the venirepersons questioned on voir dire in respondent's trial. Nevertheless, he was able to testify as to the jury selection process based upon his contemporaneous hand-written notes, the voir dire notes of testimony and his general strategy while a prosecutor.

The prosecutor explicitly testified that race was not a factor that he considered in exercising his strikes. Indeed, he did not even record in his notes, made at the time of voir dire, the

race of any of the venirepersons questioned. Rather, those notes -- which were made before Batson, when the prosecutor had no reason to think that they would ever be viewed by anyone other than himself -- reflect a deliberative process that took into account only the individual characteristics of the potential jurors.

With respect to his general jury selection strategy, the prosecutor testified that he usually favored venirepersons who appeared capable of cooperating with others and who responded well to him, as opposed to defense counsel, during voir dire. He favored venirepersons with a good employment history. He also considered a potential juror's educational background and, to the extent that it was disclosed during voir dire, the occupations and background of the venireperson's family and friends.

With respect to the particular black venirepersons that he struck in respondent's case, the prosecutor articulated specific non-racial reasons, credited by the magistrate, for five of his six peremptory challenges.[2] The

---

[2]The prosecutor testified that although he was initially inclined to accept Richard Edwards, he immediately changed his mind and decided to strike him when Edwards revealed during voir dire that his son had been convicted for carrying a .357 Magnum into a bank. The prosecutor struck Sammy Toney because he was sitting next to Edwards, had a background remarkably similar to Edwards, and might have been friendly with him. The prosecutor noted that Toney and Edwards were each 56 years old and originally from South Carolina; neither had completed high school; and each was unemployed from a blue collar position at the time of voir dire.

Stanley Logue was struck because he described his educational background as "liberal arts." The prosecutor viewed liberal arts majors as inquisitive, inclined to look for doubt, and likely to raise issues not addressed by the attorneys at trial.

(Footnote Continued)

prosecutor, however, was not able to recall his precise non-racial reason for striking the sixth venireperson, Alice Wright. Nevertheless, the magistrate found that the prosecutor's hand-written notes affirmatively eliminated racial bias as a motivation for that peremptory challenge.

This factual finding was exceedingly well-supported. In his hand-written notes made at the time of voir dire -- more than three years before Batson was even decided -- the prosecutor initially wrote "OK" next to Wright's name. He

---

(Footnote Continued)

The prosecutor struck Rudolph Gray because he had been arrested for interfering with a police officer, and, therefore, was likely to be critical of the prosecution. Finally, the prosecutor removed Alma Nottingham because, as even defense counsel noted during voir dire, she was tentative when questioned about whether she could be fair to both the prosecution and the defense at trial.

testified that that notation meant that when he first saw Wright -- and her race was plainly evident -- he was inclined to accept her as a juror. After listening to Wright's answers and observing her demeanor during voir dire, however, he changed his mind and decided to strike her.[3] Although the prosecutor was not able to recall specifically why he had changed his mind six years earlier, the magistrate found that his initial inclination to accept venireperson Wright, when virtually all he knew about her was her physical appearance, including her race, eliminated any inference of discriminatory intent.

---

[3]The prosecutor testified that Wright's age of seventy may have been a factor in his decision to strike her. Moreover, like venirepersons Edwards and Toney, whom the prosecutor also struck, Wright fit a profile of being from the South, not having completed her high school education, and being unemployed at the time of trial. See note 2, supra.

Appendix C, C-44 ("the initials 'O.K.' written in the prosecutor's notes dissipates the inference that the prosecutor struck this juror solely because of race.").[4]

In expressly crediting the prosecutor's testimony and finding as a fact that his peremptory strike of venireperson Wright was not motivated by racial bias and that he did not discriminate in jury selection, the magistrate stated: "We also have no reason to conclude that [the prosecutor] exercised

---

[4]The prosecutor also wrote "OK" next to Edwards' name, indicating that he was inclined to accept Edwards as a juror before he revealed his son's conviction for a weapons offense. See note 2, supra. As with venireperson Wright, the magistrate found that the prosecutor's initial inclination to accept Edwards refuted any inference of racial motivation. Appendix C, C-41 - C-42. With Edwards, however, the prosecutor was also able to affirmatively reconstruct the race-neutral reason for his strike.

purposeful discrimination or that his motives and creditability [sic] are suspect." Appendix C, C-40. The magistrate, however, thereafter erroneously concluded as a matter of law that Batson required relief, despite the elimination of racially discriminatory intent. He did so because the prosecutor was unable to recall his precise non-racial reason for striking Wright six years earlier. Id. at C-67 ("I do not believe that [the prosecutor] utilized his peremptory challenges in a discriminatory manner, but only that he failed to satisfy the Batson test.").

The District Court approved and adopted the magistrate's report and recommendation, and granted respondent's petition for a writ of habeas corpus. Specifically, the District Court adopted both the magistrate's finding that racial bias was not a reason for the prosecutor's strike of venireperson Wright, as well as

the conclusion that Batson nonetheless compelled relief because the prosecutor "failed to articulate a neutral reason for challenging one of the six jurors." Appendix B, B-3.

The Third Circuit affirmed the District Court's grant of respondent's habeas corpus petition.[5] The Appeals Court acknowledged that, given the passage of six years between respondent's trial and the Batson hearing, it was not surprising that the prosecutor could not

---

[5]On appeal, respondent conceded the validity of the prosecutor's explanation for three of his peremptory strikes (Edwards, Gray and Nottingham), but continued to challenge the basis for two of the strikes (Toney and Logue), in addition to venireperson Wright. The Third Circuit, however, rejected respondent's challenge to the prosecutor's explanation for those two strikes because respondent failed to show that the District Court's decision to credit them was clearly erroneous. Appendix A, A-4, n.1.

remember the non-racial reason for one of his strikes (Appendix A, A-13), and quoted the prosecutor's testimony that he was initially inclined to accept juror Wright (Id. at A-11). Nevertheless, the Appeals Court completely disregarded the District Court's factual finding that the prosecutor's initial inclination to accept Wright, when he obviously knew her race, eliminated any inference of racially discriminatory intent.

Like the District Court, the Appeals Court held that Batson required the grant of relief, regardless of the uncontradicted, objective evidence excluding racial bias as a motivation for the peremptory challenge. It so held solely because the prosecutor could not articulate the precise non-racial reason that motivated his strike of venireperson Wright six years earlier. Review of that decision is imperative.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE A DECISIONAL CONFLICT AMONG THE CIRCUITS AND MAKE CLEAR THAT BATSON v. KENTUCKY DOES NOT REQUIRE RELIEF IN A CASE TRIED YEARS BEFORE BATSON WAS DECIDED WHERE CREDITED, UNCONTRADICTED, CIRCUMSTANTIAL EVIDENCE SUPPORTS A HABEAS COURT'S FACTUAL FINDING THAT RACIAL BIAS WAS NOT THE MOTIVE FOR A PROSECUTOR'S USE OF A PEREMPTORY CHALLENGE AND THE PROSECUTOR IS UNABLE TO RECALL THE PRECISE RACE-NEUTRAL REASON FOR THE STRIKE SOLELY BECAUSE OF THE PASSAGE OF TIME.

Taking Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), to an absurd and illogical extreme that was never intended by this Court, the Third Circuit granted respondent relief in the face of evidence, credited by the District Court, which clearly eliminated racial bias as a motive for the prosecutor's peremptory challenge. Review by this Court is, therefore, essential.

Batson's general presumption of racial bias, which arises upon a prosecutor's inability to articulate a precise

racially neutral reason for a peremptory strike, does not logically follow in a pre-Batson case such as this, where the failure to articulate such a reason six years after trial is due only to the prosecutor's admittedly genuine inability to remember, and where, as here, the objective, uncontradicted evidence, credited by the District Court, eliminates racial discrimination as the motive for the peremptory challenge.[6] Indeed, granting relief in a case such as this

---

[6]Because Batson applies to all cases that were not yet final when Batson was decided and because pre-Batson prosecutors had no reason to record the reasons for their exercise of strikes, the situation here presented already occurs with some frequency (see pages 23-27, infra). Should Congress, which has recently considered legislation to make Batson fully retroactive (see, e.g., the failed Berman amendment to H.R. 5269), ultimately be successful in that endeavor, similar cases would arise in far greater numbers, thereby jeopardizing many additional valid and properly obtained convictions.

contravenes this Court's clear policy -- expressed in Allen v. Hardy, 478 U.S. 255, 106 S.Ct. 2878 (1986) -- against interpreting and applying Batson to grant convicts windfall relief in pre-Batson cases where dimming memories preclude the prosecution from marshalling its proof. Relief in such cases is even more inappropriate where, as here, evidence other than the prosecutor's articulation of his reason was available and relied upon by the factfinder to exclude race as the motivation for the exercise of a peremptory challenge.

Petitioners do not contend, and never have contended, that a prosecutor generally can meet his burden under Batson by claiming not to remember the reason for a strike. As this Court recognized in Batson, where the prosecutor, at the time of trial, is unable to articulate a race-neutral reason for his peremptory

challenge, an inference of racial discrimination logically follows. Here, however, where the prosecutor was not called upon to explain his strikes until six years after trial, the prosecutor's inability to articulate a race-neutral reason supports only the inference that he cannot recall the reason for his strike, not the inference relevant for Batson purposes that the strike was racially motivated.[7]

Notwithstanding the prosecutor's inability in this pre-Batson case to recall the reason for his strike of one potential juror, the District Court had before it other evidence from which it

---

[7]Indeed, the District Court expressly credited the prosecutor's testimony that he could not remember the precise race-neutral reason for his strike of venireperson Wright, and the Third Circuit noted that the prosecutor's inability to recall was not surprising given the six years between trial and the hearing.

could, and did, find that that peremptory strike was not motivated by racial bias.[8] That affirmative finding of non-discrimination was based upon the prosecutor's contemporaneous hand-written notes, which reflected a deliberative process that did not even consider the race of the venirepersons and which affirmatively showed that the prosecutor initially intended to accept Wright, when he obviously knew her race, thereby eliminating racial bias as the motivation for the

---

[8]The District Court's finding of non-discrimination is a factual finding, which is entitled to great deference. Batson, supra, 106 S.Ct. at 1724, n. 21. Nevertheless, in granting relief, the Third Circuit expressed its view that, despite being acceptable under Batson, some of the prosecutor's race-neutral reasons for striking venirepersons other than Wright were "not strong." Appendix A, A-6, n.2, A-13. That comment is nothing more than a thinly veiled reassessment of the prosecutor's credibility, a matter clearly beyond the Court of Appeals' proper scope of review.

prosecutor's subsequent decision to strike her.

Nevertheless, the Third Circuit granted relief, in the absence of racial discrimination, solely because the prosecutor could not remember, six years after trial, the precise race-neutral reason for one of his peremptory strikes. That ruling, in the face of an affirmative factual finding of non-discrimination, not only misapplied this Court's decision in Batson and ignored the mandate of Allen v. Hardy, supra, but it also conflicts with the rulings of the United States Courts of Appeals for the Eighth and the Fourth Circuits.[9]

---

[9]The Third Circuit crafted its opinion in a way that unsuccessfully attempts to disguise the import of its decision and the conflict among the Circuits. Thus, although the Appeals Court quoted in its opinion the

(Footnote Continued)

Batson prohibits only intentional racial discrimination and permits the prosecutor to freely strike venirepersons of any racial minority so long as he does not do so because of their race. Thus, the whole purpose behind Batson's evidentiary procedures is to provide the factfinder with the ability to make an informed decision as to the prosecutor's motivation in exercising his peremptory challenges. Where the

---

(Footnote Continued)
prosecutor's testimony that he was initially inclined to accept venireperson Wright (Appendix A, A-11), the Third Circuit ignored the District Court's factual finding that that evidence eliminated any inference of discrimination (Appendix C, C-44, C-67). Indeed, the Third Circuit purported to base its decision upon the principle -- which the Commonwealth has never disputed -- that Batson requires relief even where only one venireperson is excluded for racial reasons. Appendix A, A-14 - A-17. The record, however, affirmatively shows, and the District Court found as a fact, that no venirepersons were excluded on the basis of race.

overwhelming, uncontradicted evidence eliminates any inference of discrimination, Batson does not require relief. Indeed, to grant relief in a case such as this contravenes Batson's express purpose of prohibiting only purposeful discrimination, while preserving the peremptory challenge.

Here, the prosecutor fully met his burden to explain his peremptory challenges by offering racially neutral reasons for five of his strikes and by showing through evidence, other than general assertions of non-discrimination, that his remaining strike was not the result of racial bias. It is ludicrous to hold that a prisoner is automatically entitled to relief in a pre-Batson case, merely because the prosecutor cannot remember the precise non-racial reason for a single strike six years earlier, where, as here, the prosecutor successfully

excludes race as a motive for his peremptory challenge. To suggest, as the Third Circuit does, that the interests of justice are served by expending public funds and judicial and prosecutorial resources for a new trial in the face of an affirmative, well-supported factual finding of non-discrimination surely turns justice on its head.

Such considerations have led other Circuits to accommodate the evidentiary rule of Batson to the unique difficulties attending pre-Batson cases. Unlike the Third Circuit, the Fourth and the Eighth Circuits have expressly recognized that in a pre-Batson case such as this, the prosecutor's inability to remember his precise non-racial reason for striking each potential juror does not logically give rise to an inference of racial discrimination and is not fatal to his ability to satisfy the prosecution's

burden under Batson.[10] Thus, in United States v. Wilson, 867 F.2d 486 (8th Cir.), cert. denied, 110 S.Ct. 92 (1989), the Eighth Circuit rejected the defendant's Batson claim even though the prosecutor could not remember the reason for two out of three of his peremptory strikes of black venirepersons. The prosecutor could not recall why he struck two black women from the venire, but testified that generally in a case involving "street" crime, he tried to maximize the number of men on the jury. In view of the two and one-half years between the defendant's trial and the Batson hearing, the Eighth

---

[10] In briefing and argument before the Third Circuit, petitioners cited and expressly relied upon the Fourth and Eighth Circuit cases cited above. Nevertheless, in its opinion the Third Circuit failed to even address, much less distinguish, the reasoning applied by those Courts of Appeals in interpreting Batson.

burden under Batson.[10] Thus, in United States v. Wilson, 467 F.2d 455 (6th Cir.), cert. denied, 410 U.S. cc. 72 (1969), the Eighth Circuit rejected the defendant's Batson claim even though the prosecutor could not remember the reason for two out of three of his peremptory strikes of black veniremembers. The prosecutor could not recall why he struck two black women from the venire, but testified that generally in a case involving "street" crime, he tried to maximize the number of men on the jury. In view of the two and one-half years between the defendant's trial and the Batson hearing, the Eighth

---

[10] In briefing and argument before the Third Circuit, petitioners cited and expressly relied on the Fourth and Eighth Circuit cases cited above. Nevertheless, in its opinion the Third Circuit failed to even address, much less distinguish, the reasoning applied by those Courts of Appeals in interpreting Batson.

Circuit found the prosecutor's explanation acceptable under Batson.

In United States v. Nicholson, 885 F.2d 481 (8th Cir. 1989), the Eighth Circuit also rejected the defendant's Batson claim where the prosecutor was unable to remember his reasons for striking three black venirepersons. Instead, taking into account the two years between trial and the Batson hearing, the court credited and relied upon the prosecutor's testimony as to the general guidelines that he normally followed in exercising peremptory challenges. See also United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986) (failure to explain every peremptory strike is not necessarily fatal to prosecutor's ability to meet burden under Batson); United States v. Forbes, 816 F.2d 1006, 1011, n. 7 (5th Cir. 1987) (same).

The Fourth Circuit, too, has rejected the Third Circuit's illogical extension of Batson. In United States v. Harrell, a/k/a Allen, 847 F.2d 138 (4th Cir.), cert. denied, 488 U.S. 944, 109 S.Ct. 371 (1988), the Fourth Circuit adopted the opinion of the District Court in United States v. Allen, a/k/a Harrell, 666 F. Supp. 847 (E.D. Va. 1987), holding that the government had successfully met its burden under Batson. There, the prosecutor testified with respect to one venireperson that he had written "no" next to her name, indicating that he struck her based upon her demeanor, although he could not recall specifically what he had observed about her at the time of trial that he found unacceptable. In rejecting the defendant's claim, the court noted that two years had passed since trial and, therefore, found credible and acceptable the prosecutor's explanation, to the best

of his recollection, for striking the venireperson based upon his perception of her demeanor.

Unlike the Eighth and the Fourth Circuits, the Third Circuit's analysis virtually guarantees windfall relief to any defendant convicted before Batson who makes a prima facie showing of discrimination. As this Court recognized in Allen v. Hardy, supra, 106 S.Ct. at 288:

> [It] would be impossible in virtually every [such] case [for the prosecutor to explain his reasons for the challenges] since the prosecutor, relying on Swain, would have had no reason to think such an explanation would someday be necessary. Many final convictions therefore would be vacated, with trial "hampered by problems of lost evidence, faulty memory, and missing witnesses."

(citations omitted).

As the foregoing cases show, the issue presented by this case is recurring with frequency if for no other reason than the fact that Batson applies to all cases that were pending on direct review at the

time it was decided. Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987). See also n.6, supra. It is essential that Batson's mandate be clarified so that henceforth relief is granted under Batson only in cases of purposeful racial discrimination. For that reason, and to resolve the decisional conflict among the Circuits, this Court should grant review.

CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania, through the named petitioners, respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,

GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
(Counsel of Record)

ELIZABETH J. CHAMBERS
Chief, Federal Litigation

KATHY L. ECHTERNACH
Assistant District Attorney

WILLIAM G. CHADWICK, Jr.
First Assistant District Attorney
RONALD D. CASTILLE
District Attorney

1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700